IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1289

LUTHERAN HOSPITAL OF MILWAUKEE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE.[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *amicus curiae* to present its views in a case of great importance in the application of the National Labor Relations Act to the newly-covered health care industry.[3] The question

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest association of health care institutions of its kind in the United States.

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

raised in this case is the extent to which hospitals may regulate employee solicitation and distribution activity in hospital areas frequented by patients, relatives, visitors and the public.

The National Labor Relations Board has acknowledged that its traditional position regarding employer rules on solicitation and distribution is inappropriate for this unique industry. *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB No. 182 (1976).[4] However, in *St. John's* while the Board ruled that the "special considerations" of health care institutions support an expanded prohibition on employee solicitation and distribution activities—it improperly allowed such prohibitions only in "immediate patient care areas".[5]

AHA contended both in briefs and in oral argument in the Tenth Circuit's review of that case that the Board's ruling did not sufficiently protect the interests of its member hospitals, the patients who are served therein or the public who visit the hospital premises. The Tenth Circuit agreed with the hospital and industry positions and denied enforcement to the Board's Order. The Court there held that solicitation and distribution could be prohibited in *all* hospital areas to which patients and visitors have access.

AHA became involved in the instant case when the Seventh Circuit—in direct conflict with the Tenth Circuit's *St. John's* decision—adopted the Board's rule.[6]

Additional litigation has resulted from the Board's repeated application of its erroneous and unsuitable *St. John's* rule. In addition to the Tenth Circuit's *St. John's* decision and the ruling of the Seventh Circuit in *Lutheran*, the District of Columbia Circuit has recently decided *Baylor University Medical Center*

4. See *St. John's Hospital & School of Nursing, Inc.* v. *NLRB*, *den. enf. in part*, 557 F. 2d 1368 (10th Cir. 1977).

5. 222 NLRB No. 182 (1976).

6. AHA filed a brief *amicus curiae* with the Seventh Circuit in support of Lutheran Hospital's petition for rehearing *en banc*.

v. *NLRB*.[7] That Court joined the Tenth Circuit in ruling that the Board's policy regarding hospital solicitation/distribution rules is inappropriate. Another Board decision applying its *St. John's* rule (*Baptist Hospital, Inc.*, 233 NLRB No. 34 (1976)) is presently pending in the Sixth Circuit.[8]

This Court granted certiorari and on April 24, 1978 heard oral argument in *N. L. R. B.* v. *Beth Israel Hospital*.[9] *Beth Israel* however, focuses upon only the propriety of hospital solicitation/distribution rules in hospital cafeterias and coffee shops. This case, unlike *Beth Israel*, presents the application of such rules in all areas of the hospital to which patients, their relatives, visitors and the public use or have access. This case further presents the complete conflict between the circuit courts as to the Board's position on solicitation and distribution rules in a hospital setting.

REASONS FOR GRANTING THE WRIT.

A. The Seventh Circuit's Decision Below Is in Conflict With Other Circuit Court Decisions.

Four circuit courts have considered the issue of a hospital's right to prohibit employee solicitation/distribution activity on hospital premises. Only the Seventh Circuit in the instant case has followed the Board's position that employee solicitation/distribution activity may only be regulated in "immediate patient care" areas of a hospital.

While the Seventh Circuit conceded that "organizational activities can arouse intense emotion and create heated arguments"[10] and that employee solicitation can result in "turmoil",

7. *Baylor University Medical Center* v. *NLRB*, ... F. 2d ....., 97 LRRM 2669 (D. C. Cir. 1978).

8. Dkt. No. 76-1675.

9. *NLRB* v. *Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), *cert. granted* No. 77-152, 46 U. S. L. W. 3446 (January 17, 1978).

10. *Lutheran Hospital of Milwaukee Inc.* v. *NLRB*, 564 F. 2d 208, 215 (7th Cir. 1977).

the Court illogically reasoned that only in immediate patient care areas may such conduct be prohibited. As to other hospital areas to which patients and their visitors have access, however, the Seventh Circuit stated that hospitals cannot regulate employee activity. In its ruling the Court below made a series of unwarranted conclusions about hospital patients and patient concerns as follows:

- ". . . a *typical patient* or visitor would be *indifferent* to solicitation and distribution conducted outside of immediate patient care areas."
- ". . . the conduct of employees in locations such as cafeterias and lounges is *irrelevant* to the *ordinary patient*."
- "We cannot believe that patients and their visitors who are present in these areas are likely to become 'unsettled' upon exposure to organizational activities."
- "Labor organizations are common entities in this country, and only an *extraordinary patient* would be so dismayed at witnessing an attempt to form one that *his health would actually become impaired*."[11] (emphasis added)

Certainly, it is unnecessary to demonstrate that patient health will be actually impaired before solicitation and distribution may be restricted. Hospitals serve every type of patient. There are no "typical" patients or "extraordinary" patients, whatever those terms were intended to mean. All patients however, do have a common need and a common right to a "tranquil atmosphere" in which to heal.

The Seventh Circuit, like the Board, made a distinction between immediate patient care areas and other areas of a hospital. Yet, this very distinction was overturned by the Tenth Circuit in its review of *St. John's* because:

> ". . . the ultimate factual inferences on which the Board's distinction was based were drawn not from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental and emotional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations."[12]

11. *Id.*

Moreover, the Board's *St. John's* rule relied upon by the Court below repudiates the Board's own previous policy regarding hospitals and the affect of solicitation and distribution activities on patients and visitors. This prior policy of the Board was set forth in *Guyan Valley Hospital*, 198 NLRB 107 (1972). In that case the Board said:

> "[it] must be recalled that Respondent's facility is not a manufacturing plant, it is a hospital. . . . Further, the hospital services ill individuals who, in their weakened condition, may readily be upset if they overhear antiunion-prounion arguments among employees while they (the patients) are in their rooms or in the halls or elevators. And a hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence."[13]

As the D. C. Circuit said of *Guyan* in its *Baylor University Medical Center* opinion: "It is surprising that the NLRB changed its own established viewpoint on this matter so utterly, and we find its now repudiated analysis more appropriate than its present position. . . ."[14]

B. The Court Below Erred in Providing Less Protection for Hospital Patients Than for Customers of Retail Stores and Restaurants.

The Seventh Circuit, like the Board, has declined to extend to hospital patients the same degree of protection from the "turmoil"[15] of solicitation and distribution activity as is routinely extended to customers of retail stores and restaurants. For stores

12. 557 F. 2d at 1373.
13. 198 NLRB at 111.
14. 97 LRRM 2669 at 2673.
15. 564 F. 2d at 215.

and restaurants, the Board has developed an exception to its traditional holdings regarding rules on solicitation and distribution. The Board allows the prohibition of such activities in all store and restaurant areas to which customers have access.[16] Surprisingly, the Board's concern for customers has not been extended to hospital patients and their visitors.

The Seventh Circuit attempted to justify the different protection afforded customers of retail stores and restaurants as compared to hospital patients as follows:

- As to stores and restaurants: ". . . insofar as union organizational activities create an abnormal atmosphere on the sales floor or in public areas, they interfere with the employees' job performance and disrupt the store or restaurant's performance of its primary function."
- As to hospitals: ". . . while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function."[17]

The error in this analogy is that the Board has not based its store-restaurant standard on employee job performance considerations. Rather, the Board's concern has been with protecting the customer from "exacerbating disturbances" which may affect the "rapport" between the commercial enterprise and its patron.[18]

16. See *e.g.*, *May Department Store Co.*, 59 NLRB 976 (1944), *enf'd* 154 F. 2d 533 (8th Cir. 1945), *cert. den'd*, 329 U. S. 725 (1946); *J. L. Hudson Co.*, 67 NLRB 1403 (1946); *Goldblatt Bros., Inc.*, 77 NLRB No. 24 (1948); *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf'd*, 200 F. 2d 375 (7th Cir. 1953); *McDonald's Corporation*, 205 NLRB 404 (1973); *Bankers Club Inc.*, 218 NLRB No. 7 (1975); *Marriott Corp.*, 223 NLRB No. 141 (1976).

17. 564 F. 2d at 214.

18. *McDonald's Corporation*, 205 NLRB at 407.

For example, in *McDonald's Corporation*, 205 NLRB 404 (1973) it was found that:

> ". . . there is not probative or substantial evidence that union or other solicitation would not be obvious to Employer's customers. Some solicitation might result in a pleasant and informative chat between the employees on their nonwork time in working areas. On the other hand, it might lead to a bitter exchange of insults or worse, the latter not being likely to be conducive to good digestion by Employer's hopefully otherwise happy customers."[19]

These restaurants were considered to be ". . . retail establishments open to the public and designed and operated so to please each customer that they would be financially successful."[20]

In misstating the store-restaurant rule as based on employee job performance, the Seventh Circuit concluded that hospital patients are similarly upset only when employee job performance is affected. Concluding that most employees work in "immediate patient care areas," the court reasoned that patients would not be upset by solicitation in other areas. The rationale is that disruption caused by off-duty employees in cafeterias, lounges and similar areas is not as upsetting to patients as where patients do see an adverse effect on employees' job performance. This theory overlooks the special need of patients and their visitors for tranquility in times of illness and stress. Nonetheless, this rationale explains the Seventh Circuit's conclusions about the effects of solicitation and distribution on patients. Thus, the court erroneously observed:

- "Patients and visitors do not require absolute quiet in cafeterias and lounges."
- ". . . Patients in general are not adversely affected by organizational activities in areas of a hospital such as cafeterias and lounges."

19. *Id.* at n. 18.

20. *Id.* See also, *Bankers Club, Inc., supra,* in which concern was expressed as to the possible "customer antagonism" caused by solicitation and distribution activities. 218 NLRB at 27.

- ". . . the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient."[21]

The different standard of protection afforded hospital patients as contrasted with customers of stores and restaurants is significant. The concern for the needs of ill patients and their families who seek comfort in a hospital lounge or cafeteria should be at least as great as the concern given to the "digestion," "rapport" and "happiness"[22] of restaurant patrons.

It is significant that the Seventh Circuit recognized that an "abnormal atmosphere"[23] may be created in these other patient and visitor access areas as a result of solicitation and distribution activities. This is in conflict with even the Board's realization that a "tranquil atmosphere"[24] is essential to carrying out a hospital's primary function of patient care.

C. There Is No Basis in Fact or Law for the Board's "Immediate Patient Care Area" Concept.

None of the four Circuit Courts which have considered the Board's policy on hospital solicitation/distribution rules have been able to define the key concept of that policy: "immediate patient care areas." In allowing restrictions on solicitation and distribution in such areas, but not in other patient or visitor access areas, the Board developed a concept unsuitable to the realities of hospital life. This concept is particularly inappropriate because it was not based on any record evidence. As noted above, the Seventh Circuit, unlike the other three Circuit Courts, endorsed the Board's concept. This result was reached by that Court notwithstanding its own observation of the Board's rule that:

21. 564 F. 2d at 215.

22. *McDonald's Corporation,* 205 NLRB at 407.

23. 564 F. 2d at 214.

24. *St. John's Hospital & School of Nursing, Inc.,* 222 NLRB at 1150.

> ". . . further litigation will be necessary to determine in exactly which areas of a hospital solicitation and distribution may be forbidden. In our judgment, however, this clarifying process can take place under the rubric of the Board's decision in *St. John's* as future litigation flashes out a definition of 'immediate patient care areas.' This phrase is far from being unambiguous and it will be open to hospitals to demonstrate that a particular area is functionally given over to patient care."[25]

In *Beth Israel,* the First Circuit did not directly rule on the Board's *St. John's* policy, but made the following critical comment:

> "We would add that a phrase like 'immediate patient-care areas' is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a 'patient-care area'? Would the waiting room in the emergency ward?"[26]

In *Baylor University,* the D. C. Circuit Court noted that it is "manifestly" impossible "to determine with any confidence and rationality which areas in a hospital are and which are not 'immediately' involved in patient care. . . ." 97 LRRM at 2670.

The Tenth Circuit, in directly overturning the Board's *St. John's* rule, also determined that the concept was inappropriate:

> ". . . the distinction drawn by the Board between 'strictly patient care areas' and 'other patient access areas' necessarily 'involve[s] such ephemeral inquiries' as whether the hallways outside a patient's room are 'strictly' involved in patient care when used for transporting the patient from his room to surgery, but not when used by hospital employees to transport medicines or supplies to a bed-ridden patient. Is a hallway or elevator 'more' involved in patient

25. 564 F. 2d at 216. See also the concurring opinion of Judge Jameson which considered the Board's rule to be "unduly broad if not ambiguous." 564 F. 2d at 216.

26. *NLRB* v. *Beth Israel Hospital,* 554 F. 2d 477, 482 n. 6 (1st Cir. 1977).

> care when used by an ambulatory patient on his or her way to a 'public' cafeteria? Does solicitation carried on in a patient's room or operating room suddenly lose its 'unsettling effect' if moved to the hallway outside the patient's open door or to the elevator in which the patient is being transported to surgery. 'Examples are endless. All lead to the conclusion that the dichotomy poses more problems than it solves.' "[27]

The Tenth Circuit thereupon concluded:

> "Once it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and peace of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others."[28]

In view of this judicial disapproval and outright rejection of the Board's "immediate patient care" area concept, this Court should overturn that arbitrary distinction.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth by the Petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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27. *St. John's Hospital & School of Nursing, Inc.*, 557 F. 2d 1368, 1373 (10th Cir. 1977).

28. *Id.*